

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

DANIEL TILBURY,

Petitioner,

No. C 15-1266 NJV (PR)

vs.

**ORDER FOR RESPONDENT
TO SHOW CAUSE**

S. FRAUENHEIM,

Respondent.

Petitioner, a state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted in Santa Clara County, which is in this district, so venue is proper here. See 28 U.S.C. § 2241(d). Petitioner has also applied for leave to proceed in forma pauperis and consented to the jurisdiction of a Magistrate Judge.

BACKGROUND

A jury convicted petitioner of first degree murder for the killing of his ex-wife after he shot her seven times with a .50 caliber pistol. He was sentenced to 50 years to life in prison.

DISCUSSION

A. Standard of Review

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody

1 pursuant to a judgment of a state court must “specify all the grounds for relief available to
 2 the petitioner ... [and] state the facts supporting each ground.” Rule 2(c) of the Rules
 3 Governing § 2254 Cases, 28 U.S.C. foll. § 2254. “[N]otice’ pleading is not sufficient, for the
 4 petition is expected to state facts that point to a ‘real possibility of constitutional error.’”
 5 Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir.
 6 1970)). “Habeas petitions which appear on their face to be legally insufficient are subject
 7 to summary dismissal.” *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102,
 8 1108 (9th Cir. 1996) (Schroeder, J., concurring).

9 **B. Legal Claims**

10 As grounds for federal habeas relief, petitioner asserts that: (1) his rights were
 11 violated by the trial court’s failure to define the term “provocation” in the manslaughter
 12 instruction; (2) the trial court erred by refusing to modify the jury instructions on murder and
 13 manslaughter as requested by trial counsel; (3) the trial court erred by using a murder
 14 instruction which did not instruct that lack of provocation is an element of murder; (4) the
 15 trial court committed structural error by refusing in advance to answer questions from the
 16 jury; (5) he was deprived of the right to present a defense by the trial court’s exclusion of
 17 evidence regarding petitioner’s concerns about his children’s welfare; (6) there was
 18 insufficient evidence to establish the malice element; (7) the trial court violated his rights by
 19 not permitting trial counsel to conduct voir dire on the jury’s predisposition regarding
 20 manslaughter; (8) cumulative error of the above claims; (9) ineffective assistance of
 21 counsel due to the failure to assert an unconsciousness defense; (10) ineffective
 22 assistance of counsel due to the failure to object to the admission of irrelevant and
 23 prejudicial evidence; (11) ineffective assistance of counsel due to the failure to object to the
 24 prosecutor’s misconduct in closing argument; and (12) cumulative error arising from trial
 25 counsel’s errors. Liberally construed, these claims are sufficient to require a response.

26 **CONCLUSION**

27 1. The clerk shall serve by regular mail a copy of this order, the petition and all
 28 attachments thereto and a Magistrate Judge jurisdiction consent form on respondent and

1 respondent's attorney, the Attorney General of the State of California. The clerk also shall
2 serve a copy of this order on petitioner.

3 2. Respondent shall file with the court and serve on petitioner, within fifty-six (56)
4 days of the issuance of this order, an answer conforming in all respects to Rule 5 of the
5 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should
6 not be granted. Respondent shall file with the answer and serve on petitioner a copy of all
7 portions of the state trial record that have been transcribed previously and that are relevant
8 to a determination of the issues presented by the petition.

9 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
10 the court and serving it on respondent within twenty-eight (28) days of his receipt of the
11 answer.

12 3. Respondent may file a motion to dismiss on procedural grounds in lieu of an
13 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
14 Section 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the
15 date this order is entered. If a motion is filed, petitioner shall file with the court and serve
16 on respondent an opposition or statement of non-opposition within twenty-eight (28) days of
17 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply
18 within fourteen (14) days of receipt of any opposition.

19 4. Petitioner is reminded that all communications with the court must be served on
20 respondent by mailing a true copy of the document to respondent's counsel. Petitioner
21 must keep the court informed of any change of address and must comply with the court's
22 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
23 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*
24 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

25 **IT IS SO ORDERED.**

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27 Dated: April 2, 2015.

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NANDOR J. VADAS
United States Magistrate Judge